

A **ECH DEVELOPMENT & MANAGEMENT SDN BHD v.
PRABAGARAN PERUMAL & ANOR AND ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA

ZALEHA YUSOF JCA

AB KARIM AB JALIL JCA

B LEE SWEE SENG JCA

[CIVIL APPEALS NO: W-02(NCVC)(W)-1761-08-2018

& W-02(NCVC)(W)-1778-08-2018]

20 APRIL 2020

C **TORT:** *Trespass – Land – Developer sold land to purchasers – Size of land in final title different from size stated in sale and purchase agreement – Mistake by Land Office – Developer paid damages to purchasers for shortfall in size of land – New title issued for shortfall land to developer – Part of structure of house built on new title – Whether amounted to trespass to land*

D **TORT:** *Negligence – Land – Developer built house on land and sold it to purchasers – Size of land in final title different from size stated in sale and purchase agreement – Mistake by Land Office – Developer paid damages to purchasers for shortfall in size of land – New title issued for shortfall land to developer – Part of structure of house stood on new title – Whether developer negligent in building house and compound outside boundary of title*

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The appellant ('developer') had built a house on a piece of land. The size of the land, as stated in the first sale and purchase agreement ('SPA') between the developer and the first purchasers ('previous proprietors'), was 340m² and was the corresponding qualified title. However, the previous proprietors

F later commenced an action at the High Court, against the developer for damages arising from the fact that the final title, when issued, showed that the land was less by 51m². The High Court ordered the developer to pay damages to the previous proprietors for the shortfall in the size of the land of 51m². It later transpired that the Land Office admitted its mistake and,

G accordingly, issued a separate final title for the 51m² land. Part of the house stood on this part of the land to which a new final title had been issued. By then, the previous proprietors had sold off the land to the respondents ('defendants'). The second SPA stated that the previous proprietors had sold the land and the house to the defendants with a land size of 289m², which

H would not include the kitchen that stood on a separate title in the developer's name. The developer commenced an action at the High Court, against the defendants premised on the tort of trespass. Denying trespass, the defendants argued that if there was any trespass, it was caused by the developer who had given vacant possession of the whole house and land to the previous proprietors who, in turn, had given them vacant possession upon completion

I of their SPA. The defendants counterclaimed for damages for negligence in

that the developer had built the house and its compound outside the boundary of their title with its store and shed encroaching into another piece of land belonging to the developer. Dismissing the developer's claim, the High Court held that (i) there was no trespass; and (ii) although the developer was negligent, the defendants had not proved any loss suffered by them and so, no damages was awarded. Hence, the present appeals by (i) the developer ('Appeal 1761'); and (ii) the defendants ('Appeal 1778'). The issues that arose were (i) whether there was trespass when part of the house, the store and shed of the defendants sat on the adjoining land of the developer; (ii) whether the developer owed the defendants a duty of care for pure economic loss; and (iii) whether the principle of *res judicata* would apply to bar the defendants from making a counterclaim.

Held (allowing Appeal 1761; dismissing Appeal 1778)

Per Lee Swee Seng JCA delivering the judgment of the court:

- (1) The developer, having to refund so much of the purchase price based on the shortfall in area of 51m² to the previous purchasers, could not now be expected to transfer its land under the separate title to the defendants for free. To allow the defendants to continue to encroach onto the developer's land held under the separate title would be to deprive the developer of its right over its land inconsistent with the rights conferred on it by the National Land Code and which land it had not parted or transferred to the previous proprietors and certainly not to the present proprietors in the defendants. (paras 52 & 53)
- (2) It would be an affront to the finality of title and registration of title if one's enjoyment of land could extend beyond one's registered proprietorship to include the land of one's neighbour without having to obtain a transfer of the neighbour's land merely because the structure built also rested on the neighbour's land. This claim in trespass had nothing to do with who had built the house to sit on two different titles adjoining to each other. The fact that the developer had no practical use of the 51m² held under the separate title did not mean that others, like the defendants, could encroach upon the developer's land. It might be of little use but nevertheless valuable to the developer. Whilst the developer could not have physical possession of the land because it was in the compound of the defendants, that was no bar to the developer to sue for trespass. If one has title to a piece of land, one could sue the occupier who is there without one's consent. The developer would be entitled to have the structures that encroached onto its land held under the separate title to be demolished if the defendants were not keen to purchase the 51m² land. (paras 49, 50, 54-56 & 62)

- A (3) The developer did not owe a duty of care to subsequent purchasers and proprietors to have a building constructed only within the confines of the final title to a development. What was constructed could sit well on two separate titles that the Land Office may issue. The developer and the previous proprietors had sorted out their contractual obligations to each other in the High Court and it had been adjudged that, as contractually the land as represented in the final title was not the same size as the land held under the qualified title and the difference being a shortfall of 51m², the developer was to refund to the previous proprietors the difference in the purchase price based on the agreed adjustment rate. The previous proprietors did not want the separate title and they could not pass or transfer what they did not have to the present proprietors. (paras 64, 66 & 69)
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- D (4) There was no sufficient proximity between the defendants and the developer for the court to impose or import a duty of care. The defendants did not purchase the house from the developer to begin with. They purchased it from the previous proprietors and they were fully conscious of the area of 289m² held under a final title which was what they purchased. A duty of care in tort could not arise for the defendants to bring an action in negligence against the developer when all their rights were already encapsulated in the second SPA between them and the previous proprietors. (paras 75 & 79)
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- F (5) The matters complained of in the counterclaim emanated from the same transaction and facts in that the developer had built the house and sold it to the previous proprietors and there was a shortfall in the land area in the final title by 51m². That matter had already been decided by the High Court with the developer having to refund the previous proprietors the purchase price based on the shortfall of 51m². The previous proprietors had already received the refund in the purchase price and, with that, their acceptance that the final title was only 289m². The developer ought not to be sued twice for the same problem; once by the previous proprietors and now by the present proprietors. It would result in a grave injustice to the developer who had already parted with the refund of the purchase price on a shortfall of 51m². The developer would be punished and vexed twice. (paras 114, 115 & 118)
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- H (6) The courts allowed prayers (3) to (8) of the developer's statement of claim, namely: (i) the defendants were to remove all the structures encroaching in the encroaching part of the property within 14 days from the date of judgment; (ii) in the event the defendants failed to remove all the structures, the developer was entitled to carry out the necessary actions to remove the said structures at the sole cost and expense of the defendants; (iii) the developer shall be fully indemnified by the
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defendants at all costs and expenses incurred in removing all the structures forming the encroaching part of the property; (iv) alternatively, the defendants were to purchase the developer's land at RM667,284.25 ('prayer (6)'); (v) interest at the rate of 5% per annum on the sum of RM473,444.43 from the date of judgment until the date of full payment; and (vi) the defendants were to bear all the costs and expense to be incurred for the transfer of the developer's land to the defendants. Prayer 6 shall be exercised before the expiry of three months period from the date of this order. In the event the parties could not agree on the purchase price, the determination of the valuer to be appointed by the President of the Board of Valuers, Appraisers and Estate Agents shall then be binding on the parties and the parties shall bear equally the costs of the valuation. (paras 8 & 126-128)

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Case(s) referred to:

Allan Bryan v. Judith Anne Maloney [1995] 2 CLJ 503 HC (*refd*)

Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors [1999] 3 CLJ 257 HC (*refd*)

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Caparo Industries plc v. Dickman [1990] 2 AC 605 (*refd*)

Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA (*refd*)

Karuppannan Chellapan v. Balakrishnen Subban [1994] 4 CLJ 479 FC (*refd*)

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA (*refd*)

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC (*refd*)

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Ng Yee Fong & Anor v. EW Talalla [1985] 1 LNS 146 FC (*refd*)

Portland Managements Ltd v. Harte [1976] 1 All ER 225 (*refd*)

Simaan General Contracting Co v. Pilkington Glass Ltd (No 2) [1988] 1 All ER 791 (*refd*)

Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal [2018] 6 CLJ 683 FC (*refd*)

Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC (*refd*)

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Legislation referred to:

Limitation Act 1953, s. 32

National Land Code, ss. 44(1)(a), 92, 340, 341

(Civil Appeal No: W-02(NCVC) (W)-1761-08-2018)

For the appellant - Low Kok Hee, Chan Chui Tin & Ainur Rabiutadawiyah Hassim; M/s Jal & Lim

G

For the respondent - Kamaleswari Shanmugam & Sandeep Singh; M/s Kamales & Partners

(Civil Appeal No: W-02(NCVC) (W)-1778-08-2018)

For the appellant - Kamaleswari Shanmugam & Sandeep Singh; M/s Kamales & Partners
For the respondent - Low Kok Hee, Chan Chui Tin & Ainur Rabiutadawiyah Hassim; M/s Jal & Lim

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[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCVC-565-09-2016 (overruled).]

Reported by Najib Tamby

I

A JUDGMENT

Lee Swee Seng JCA:

B [1] The problem we are about to narrate is thankfully rare. A developer found itself in a bind after having built a house on a piece of land according to the pre-computational plans, layout and building plans approved by the local authority. The size of the land as stated in the first sale and purchase agreement (“SPA”) between the developer and the first purchasers was 340m² and is the corresponding qualified title. The first purchasers who subsequently became the registered proprietors of the land (“previous proprietors”) sued the developer for damages arising from fact that the final title when issued showed that the land was less by 51m². The developer was quite certain that it was a typographical mistake of the land office that issued the final title.

D [2] However at the trial, the court decided that the final title is everything with the result that the developer was ordered to pay damages to the previous proprietors for the shortfall in the size of the land of 51m². The developer paid RM473,444.43 together with interest of RM193,839.82 to the previous proprietors under protest.

E [3] There was however a problem brewing – part of the structure of the house and the store and shed to the house had encroached on State land; a problem that the previous proprietors were fully aware.

F [4] It later transpired that the land office finally admitted its mistake and so issued a separate final title for the 51m² of land. Part of the kitchen to the house actually stands on this part of the land to which a new final title had been issued.

[5] By then, the previous proprietors were not interested in the additional final title anymore for they had sold off the land and the house to the second purchasers, the current defendants.

G [6] The developer alerted the defendants about this issue and though there were some initial discussions, there was no resolution to the problem. The developer was left with no choice but to sue for who would want a title for a piece of land, and an odd-shaped one of 51m². More importantly, part of the defendants’ house in the kitchen, store and shed stands on the developer’s land now.

H [7] The second SPA stated that the previous proprietors had sold the land and house to the defendants with a land size of 289m². Clearly, the title to that land of 289m² would not include the kitchen which stands on a separate title in the developer’s name.

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[8] The developer as plaintiff in the court below founded its cause of action on the tort of trespass and claimed as follows in its statement of claim (pp. 33-34 of RR Jilid 1 encl. 7):

- (i) Loss of use of the plaintiff's land from 16 October 2015 until all the structures forming the encroaching part of the property are being removed from the plaintiff's land to be assessed by the court;
- (ii) Interest at the rate of 5% per annum from the date of judgment until the date of full and final settlement;
- (iii) An order that the defendants are to remove all the structures form in the encroaching part of the property within fourteen (14) days from the date of the judgment;
- (iv) An order that in the event the defendants fail to remove all the structures form in the encroaching part of the property within fourteen (14) days from the date of the judgment, the plaintiff is entitled to forthwith, carry out the necessary actions to remove the structures forming the encroaching part of the property at the sole cost and expense of the defendants;
- (v) An order that the plaintiff shall be fully indemnified by the defendants of all cost and expenses incurred in removing all the structures forming the encroaching part of the property;
- (vi) Alternatively, an order that the defendants are to purchase the plaintiff's land at RM667,284.25;
- (vii) Interest at the rate of 5% per annum on the sum of RM473,444.43 from the date of judgment until the date of full payment;
- (viii) An order that the defendants are to bear all the cost and expense to be incurred for the transfer of the plaintiff's land to the defendants;
- (ix) Costs to be paid by the defendants to the plaintiff on a solicitor-client basis; and
- (x) Such other relief as the court deems fit and just.

[9] The defendants denied any trespass and argued that if there was any trespass, it was caused by the plaintiff who had given vacant possession of the whole house and land to the previous proprietors who in turn had given them vacant possession upon completion of their SPA.

[10] The defendants also counterclaimed for damages for negligence in that the plaintiff as the developer had built the house and its compound outside the boundary of their title with its store and shed encroaching into another piece of land belonging to the plaintiff.

A At The High Court

[11] The High Court held that the plaintiff developer was negligent but held that the defendants had not proved any loss suffered by them and so no damages was awarded. The High Court dismissed the plaintiff's claim with costs of RM30,000, finding that there was no trespass.

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[12] This of course raised an existential problem; the title of the 51m² land was still in the plaintiff's name but yet there was no trespass as the plaintiff had been negligent in building the house without ensuring that the kitchen was not encroaching onto another piece of land. It was a problem that would not go away.

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[13] Both sides appealed and we heard both the appeals together. We dealt with Appeal 1761 first where the plaintiff is the appellant and the defendants are the respondents. Our decision in Appeal 1761 would invariably dispose of Appeal 1778 where the defendants are the appellants and the plaintiff the respondent; as one really is the flip side of the other.

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Principles

[14] It is given that under the National Land Code the title is everything and more so the final title. One's title and interest so registered is indefeasible. Section 92 of the National Land Code ("NLC") declares as follows:

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92. Indefeasibility of final title, and rights of dealing etc.

(1) The alienation of State land to any person or body under final title shall confer on that person or body a title to the land which shall be **indefeasible** as provided in Part Twenty. (emphasis added)

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[15] One does not go behind the title unless there are fraud, forgery, void or insufficient instrument or one of the vitiating factors under s. 340 NLC where the title or interest of a person registered against the title may be set aside. Section 340 provides as follows:

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340. Registration to confer indefeasible title or interest, except in certain circumstances

(1) The **title** or interest of any person or body for the time being registered as **proprietor** of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be **indefeasible**. (emphasis added)

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[16] The National Land Code founded as it is on the Torrens system has been aptly referred to not so much as a system of registration of titles but a system of titles by registration.

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[17] With one's registered title immune from any challenge one gets to have exclusive use and enjoyment of one's title as provided for under s. 44(1)(a) of the NLC as follows: A

44. Extent of disposal: general

(1) Subject to the provisions of this Act and of any other written law for the time being in force, any person or body to whom (under this Act or a previous land law) land has been alienated, reserved land has been leased or a temporary occupation licence (including a licence so styled under a previous land law) has been granted in respect of any land, shall be entitled to- B

(a) the **exclusive use and enjoyment** of so much of the column of airspace above the surface of the land, and so much of the land below that surface, as is reasonably necessary to the lawful use and enjoyment **of the land** ... (emphasis added) C

[18] In *Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657; [2006] 6 MLJ 24 it was explained as follows: D

[3] As the registered proprietor of Lot 55482, the plaintiff is statutorily entitled by virtue of s. 44(1)(a) of the National Land Code to the exclusive use and enjoyment of Lot 55482 including so much of the land below the surface. Without a doubt, the protection of such a right is beyond dispute. **The plaintiff's land is the legal domain of the plaintiff and no one else.** As the registered proprietor, the plaintiff stands in a better position than others. (emphasis added) E

Whether There Is Trespass When Part Of The House And The Store And Shed Of The Defendants Sit On The Adjoining Land Of The Plaintiff

[19] The defendants are the registered proprietor of a piece of land held under final title GM 8782 Lot 67706 Mukim Batu, Segambut, Daerah Kuala Lumpur, Wilayah Persekutuan ("final title"). F

[20] They had bought the land together with a three storey semi-detached house from the previous proprietors for RM4.1 million *via* the second SPA dated 29 June 2015. The previous proprietors had earlier bought the land together with the house from the plaintiff for RM2,786,982.50 on 24 May 2008 under the first SPA. It was the plaintiff that built the house. G

[21] At that time, the land was held under HS(M) 12353, PT 23406, Mukim Batu, Segambut, Daerah Kuala Lumpur, Wilayah Persekutuan. The land was stated to be 340m² ("qualified title"). It was part of a housing project undertaken by the plaintiff called Lumina Kiara. H

[22] Vacant possession of the house was handed over to the previous proprietors on or around December 2010 and certificate of fitness ("CF") dated 28 March 2011 was given to them in April 2011. The final title was issued on 7 October 2009 and it was forwarded to the previous proprietors in 2011. I

- A [23] There was a problem though as the area was stated to be 289m² and not 340m².
- B [24] The previous proprietors, having registered itself as proprietors of the land, decided to sue the plaintiff as the developer and to claim for a refund of so much of the purchase price as represented in the reduced area of the land of 51m². The previous proprietors had also sued for damages for late delivery but that issue is not relevant for the present dispute. Their claim was filed on Kuala Lumpur High Court Suit No. S-22NCvC-163-2011 (“previous suit”).
- C [25] The plaintiff’s defence was that there was a mistake in the land area stated in the final title and that the final title would be rectified to reflect the correct area of 340m². The plaintiff in the previous suit in which it was the defendant also filed a counterclaim.
- D [26] At the end of the trial, the High Court on 31 May 2011 gave judgment for the previous proprietors and dismissed the developer’s counterclaim. The developer’s counterclaim was for the additional price that the previous proprietors had to pay the developer because of the increase in area of the final title if it were correctly issued. The developer appealed against the said decision but the appeal was subsequently withdrawn in early January 2012.
- E [27] Meanwhile the plaintiff developer followed through with the land office on what it believed to be a discrepancy in the final title. The land office finally admitted that it was their mistake and they issued another final title to cater for and represent the shortfall of 51m² in favor of the plaintiff after a premium of RM84,881 was paid to the land office. The said final title was
- F held under Geran 76640 Lot 80315, Mukim Batu, Segambut, Daerah Kuala Lumpur, Wilayah Persekutuan (“separate title”) was issued by the land office on 12 November 2013.
- G [28] The plaintiff wrote to the previous proprietors on 23 July 2015 and in the letter of demand asked for the repayment back of RM473,444.43 together with interest of RM193,839.82 that it had paid to them. The separate title would of course be transferred to them upon payment.
- H [29] However, the previous proprietors were no longer interested as they had on 29 June 2015 entered into an SPA (“the second SPA”) with the present defendants for the sale of the land as represented by the final title of 289m².
- I [30] When the plaintiff realised this, it issued a letter of demand dated 28 July 2016 to the defendants stating that they have trespassed onto the plaintiff’s land held under the separate title and demanded that they do remove the structures on the separate title including a store and shed that the defendants had built on it.

- [31] From the evidence adduced at the trial at p. 527 of rekod rayuan bahagian C – jilid 1, which is the certified plan of the area and house, the triangular portion on the left-hand corner of the semi-detached house drawing is the portion that is encroaching on Lot 80315, the separate title. Part of the kitchen on the ground floor, the master bedrooms of the 1st and 2nd floor, beams and structure for the house are affected by what the defendants said is the negligent building of the house by the plaintiff on the separate title. A B
- [32] Alternatively, the plaintiff proposed that the defendants do purchase the separate title for RM667,284.25 with interest at 5% per annum until acceptance of the plaintiff's proposal. The said sum was the sum paid out by the plaintiff to the previous proprietors pursuant to the judgment in the previous suit. C
- [33] When nothing was forthcoming in terms of a settled agreement, the plaintiff was left with no choice but to sue the defendants which it did in the High Court below. D
- [34] The defendants counterclaimed against the plaintiff for negligence as the developer had built the said house and its compound outside the boundaries of the final title resulting in the defendants suffering damage. E
- [35] The defendants in their defence denied that they were trespassing onto the plaintiff's land held under the separate title and that if there was any trespass, it was occasioned by the plaintiff as the developer which constructed the house. They further argued that the plaintiff did not have possession of the land represented by the separate title and so could not sue for trespass. F
- [36] The second SPA through which the defendants became the registered proprietors on 16 October 2015 was executed on 29 June 2015. It was way after the judgment that the previous proprietors had obtained on 31 May 2011. G
- [37] Very interestingly, the defendants took the position that the previous proprietors bought the said house together with the store and the shed from the plaintiff and the plaintiff had given vacant possession of it to previous purchasers. They admitted and pleaded that the final title showed an area of 289m². However, they have not committed any trespass as they were lawfully on the land as the present proprietors whose final title has been duly registered in their names and that the plaintiff had expressly consented to their occupation of the said land and moreover the plaintiff had obtained full consideration for the property and indeed had handed over vacant possession of the said property to the previous proprietors. H
- [38] They also pleaded that the plaintiff was guilty of laches. I

- A [39] Here is a case where the documents in the final title and the separate title speak for themselves. The relevant question to ask is what is the title that the previous proprietors sought to transfer to the defendants? It is the final title of GM 8782 consisting of 289m² of land. It is so stated in the second SPA and the defendants could only show their registered proprietorship on the final title.
- B [40] The next question is where does the defendants' house sits. The answer which is not disputed is that it sits on the final title and that the store and shed sit on the separate title in Geran 76640.
- C [41] The defendants are not the registered proprietors of the separate title. How then can they say that they could still validly occupy the 51m² land held under the separate title in the plaintiff's name? The obvious and logical answer must be that they cannot and the evidence is that the plaintiff has not consented to them to occupy the plaintiff's land held under the separate title.
- D [42] The plaintiff had written to the previous proprietors in 2015 and the defendants in 2016 to specifically draw their attention to the unlawful occupation.
- E [43] The defendants cannot have a better title than what the previous proprietors had. The previous proprietors signed the memorandum of transfer in Form 14A of the NLC for the final title of 289m². At that time, the previous proprietors had already known for they had already received the judgment sum for the shortfall of 51m². From the evidence given in the previous suit, the previous proprietors had already known of the problem of encroachment of the store and shed onto the adjoining land. They chose to
- F confine themselves to the area of 289m² as represented by the final title and took the refund of the purchase price based on that shortfall in area.
- G [44] They should then be candid with the defendants who are the present proprietors that the land which is the subject matter of the second SPA does not include the store and shed which stand outside the perimeter of the final title.
- H [45] As the previous proprietors were not before the court, we would not say anything further in their absence. The fact remains that the defendants did not call them as their witnesses. It cannot be denied that the previous proprietors had already received a refund of so much of the purchase price represents by the shortfall in the area of 51m².
- I [46] Since the defendants' stand is that they were not aware of this problem in the encroachment, then there was nothing preventing the defendants from bringing in the previous proprietors as third parties to the proceedings in the High Court to claim for a contribution and indemnity from the previous proprietors who expressly had opted to have a refund of the purchase price

based on the 51m² of shortfall in area instead of accepting that it could well be a mistake and to give time to the plaintiff to resolve the matter with the issuance of the separate title.

[47] In any event, not being aware of the trespass or even labouring under a mistake that there was trespass is not a defence. In *Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* (*supra*) it was held as follows:

[11] Trespass to land is actionable *per se* without any proof of damage (*Ashby v. White* (1703) 2 Ld. Raym 938). And liability is certainly strict. According to the case of *Entick v. Carrington* (1765) 19 St Jr 1029, 1066: 'Every invasion of property, be it so minute, is a trespass.' It is not the law that a man cannot be a trespasser unless he knows he is one (*Conway v. Wimpey & Co (No 2)* [1951] 2 KB 266 273). If the entry is intentional, it is actionable even though that entry was made under a mistake or the defendant honestly believed that the land was his own or, like the present case, the land was unoccupied and unalienated or that the defendant believed that he had a right of entry on the land. In *Morris v. Beardmore* [1981] AC 446, the House of Lords reasserted the fundamental right of privacy of the home. (emphasis added)

[48] As trespass is actionable *per se* without any proof of damage, it cannot be a special circumstance to negate or excuse encroachment on ground of a lack of knowledge of the encroachment. The Federal Court in *Karuppannan Chellapan v. Balakrishnen Subban* [1994] 4 CLJ 479; [1994] 3 MLJ 584 held as follows at p. 485 (CLJ); p. 591 (MLJ):

... With or without knowledge of the existence of the protrusions he is answerable in law in regard to the trespass into the airspace of his neighbour. Being the current registered owner he is duty bound to remove them. No doubt it is the personal undertaking of Mdm Chong, but she is no more the owner of Lot 26 and the building on it. Compensation from Mdm Chong may be his only redress for expenses incurred in the removal of those protrusions. But that is between him and Mdm Chong. So whatever that protrudes or encroaches into Lot 25 including fire exit and the septic tank, the owner of Lot 25 is entitled to have them removed. (emphasis added)

[49] It would be an affront to the finality of title and registration of title if one's enjoyment of land can extend beyond one's registered proprietorship to include the land of one's neighbour without having to obtain a transfer of the neighbour's land merely because the structure built had also rested on the neighbour's land.

[50] This claim in trespass has nothing to do with who had built the house to sit on two different titles adjoining to each other.

[51] Here, it happened to be built by the plaintiff who had also offered to the previous purchasers to purchase the additional 51m² of land which the previous purchasers had refused and so when they sold their property, it was clearly a sale of a single title in the final title and the separate title was not part of the second SPA and hence not transferred to the defendants.

- A [52] This is a case where the math does not add up. The plaintiff having to refund so much of the purchase price based on the shortfall in area of 51m² to the previous purchasers, it cannot now be expected to transfer its land held under the separate title to the defendants for free.
- B [53] To allow the defendants to continue to encroach onto the plaintiff's land held under the separate title would be to deprive the plaintiff of its right over its land inconsistent with the rights conferred on it by the NLC and which land it had not parted or transferred to the previous proprietors and certainly not to the present proprietors in the defendants.
- C [54] The fact that the plaintiff has no practical use of the 51m² land held under the separate title (Lot 80315) does not mean that others like the defendants can encroach upon the plaintiff's land. It may be of little use but it is nevertheless valuable to the plaintiff. As a matter of fact, what the plaintiff wants to do with its own land is its business and it is not for anyone to dictate or disparage.
- D [55] Whilst the plaintiff could not have physical possession of the land because it is in the compound of the defendants, that is no bar to the plaintiff to sue for trespass. The Court of Appeal case of *Portland Managements Ltd v. Harte* [1976] 1 All ER 225 is authority for that proposition. Scarman LJ held at pp. 229 and 231 as follows:
- E Possession is, of course, a very important matter to be considered in the action of ejectment, or the action for trespass. But the law is perfectly clear. If a stranger to the title is seeking, by reliance on some lesser or derivative interest, to obtain possession from someone who is in possession, then the defendant can rely on his possession to defeat that
- F sort of claim. But *if the absolute owner is suing, and if the absolute owner has shown by his conduct an intention to recover possession, then it is not enough for the defendant merely to assert or give evidence that he is in possession; he has got to show that he is there on the basis of some title which is consistent with the ownership of the premises being vested in the plaintiff.*
- G I cite those cases in support of the proposition, which appears to me to be clear law, that when an owner of land is making a case of trespass against a person alleged to be in possession, *all that the owner has to prove is his title and an intention to regain possession.* If the defendant to the action either admits his ownership or is faced with evidence, which the court accepts, that the plaintiff is in fact the owner, then the burden is on the
- H defendant to confess and avoid; that is to say, to set up a title or right to possession consistent with the fact of ownership vested in the plaintiff.
(emphasis added)

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[56] It is clear that if one has title to a piece of land, one can sue the occupier who is there without one's consent. It does not matter if one has not set one's foot on one's land or how long the occupier has been in occupation of the land. This is even more true in a case of the Torrens system of registration of land titles under the NLC under s. 341 of the NLC as shall be considered shortly. See the case of *Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors* [1999] 3 CLJ 257.

[57] The title is everything and one does not even have to make a physical examination of the land before buying for a search of the title in the land office would reflect all the interests or encumbrances that are on the land and registered against the land. Anybody's interest not so registered would generally not be recognised under the NLC.

[58] The defendants had also raised the defence of laches in that there was undue delay on the plaintiff bringing this action. The defence of laches is available because of the express provision of s. 32 of the Limitation Act 1953 which reads:

Acquiescence

32. Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

[59] However s. 341 NLC is clear in that adverse possession cannot be raised against a registered proprietor of the land in question. It reads:

341. Adverse possession not to extinguish titles or interests

Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein, and accordingly, **the Limitation Act 1953, shall in no circumstances operate to extinguish any title to, or interest in, land.** (emphasis added)

[60] In any event, we find that there has been no undue delay that would give any opportunity for laches to operate here as the separate title was issued only on 12 November 2013. The defendants became the registered owner of the final title on 16 October 2015. The plaintiff wrote immediately to the defendants on 29 October 2015 to notify them of the encroachment and trespass. A meeting was also held between the plaintiff and the defendants on 19 November 2015 and it was after an impasse that this suit was filed in September 2016. Where the defendants here are still in occupation of the land then there is continuous trespass which cannot bar the plaintiff from suing for vacant possession as the registered proprietor of the land.

[61] In *Ng Yee Fong & Anor v. E W Talalla* [1985] 1 LNS 146; [1986] 1 MLJ 25 the respondent there was aware of the encroachment for at least 2 ½ years before the appellant became the owner of the house. After the appellant became the owner of the house, the respondent notified the appellant about the encroachment in less than four months. The Supreme Court held that the respondent was not guilty of laches.

- A [62] There is trespass plain and simple and the plaintiff would be entitled to have the structures that encroached onto its land held under the separate title to be demolished if the defendants are not keen to purchase the 51m² land on terms that we would subsequently spell out in the end of this judgment.
- B **Whether The Plaintiff Owes The Defendants A Duty Of Care For Pure Economic Loss**
- C [63] To be clear, the defendants in their counterclaim are saying that the plaintiff was negligent in building the house such that it does not stand all on one title when it transferred the land and the house to the previous proprietors.
- D [64] To begin with, we do not agree with learned counsel for the defendants that the plaintiff owes a duty of care to subsequent purchasers and proprietors to have a building constructed only within the confines of the final title to a development. What is constructed could well sit on two separate titles that the land office may issue.
- [65] Indeed cl. 13(1) of the first SPA provides for adjustment of purchase price if the area in the qualified title is different from the final title at the rate of RM8,194.59 per m².
- E [66] The plaintiff and the previous proprietors had sorted out their contractual obligations to each other in the High Court and it had been adjudged that as contractually the land as represented in the final title is not the same size as the land held under the qualified title and the difference being a shortfall of 51m², the plaintiff as the developer is to refund to the
- F previous proprietors the difference in the purchase price based on the agreed adjustment rate.
- [67] The judgment of the High Court dated 31 May 2011 in the previous suit is clear: it says the sum of RM418,743.55 which is based on the difference in area at the adjustment rate together with interest at 8% per annum from 21 October 2009 to full settlement.
- G [68] The parties' contractual rights have been resolved and exhausted. Just as the previous proprietors could no longer stay on the plaintiff's land held under the separate title because they chose to confine themselves to the final title only and paid for the area based on the final title of 289m² they cannot
- H pass on a better title to the defendants as the present proprietors. It does not matter now that the store and shed of the house sit on a separate title.
- I [69] The previous proprietors did not want the separate title and they cannot pass or transfer what they do not have to the present proprietors in the defendants.

[70] Where the parties' contractual rights have been examined, exercised and exhausted and more so after a trial, the subsequent parties in the defendants that do not have a privity of contract with the developer cannot find a right that the previous proprietors do not have by searching for it under tort. A

[71] As a matter of policy, the court should not allow that because it not only goes against the plaintiff's right under statute in the NLC being the registered proprietor of the separate title but also that a court of law had declared the rights of the parties. B

[72] Both under the principle of the Torrens system of registration of title under the NLC as well as under the principle of *res judicata*, it would not be fair, just and reasonable to hold that the developer has a duty of care to subsequent purchasers to ensure that the house built is within just one final title and not straddling two final titles. C

[73] We are not here talking about a personal injury claim where for example the wall or beam of the house built by the plaintiff collapsed and caused bodily injury or death. In such a case, even though there is no contractual relationship between the plaintiff and the defendants, it may be argued that whoever built the wall or the beam of a house must not have built it so negligently as to allow it to fall and cause injury or death to those that it could foresee would be affected. D
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[74] In finding whether or not there exists a duty of care in a case of pure economic loss, our Federal Court in *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008; [2015] 4 MLJ 733 has followed the test of foreseeability, proximity and policy consideration as expounded in the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 as follows: F

[44] To put it in a nutshell *the preferred test is the threefold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence*. The threefold test has been recognised by the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp 617-618, His Lordship said that: G

What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which *the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other*. H
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- A [45] The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases. *The fact that damages sought by the claimant is pure economic loss not flowing from personal injury or damage to the property is also a factor to be considered.* As has often been acknowledged, a more restricted approach is preferable for cases of pure economic loss. As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement. *The reason for a more stringent approach taken in the claims involving pure economic loss is because such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues.* (emphasis added)
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- D [75] There is no sufficient proximity here between the defendants and the plaintiff for the court to impose or import a duty of care. The defendants did not purchase the house from the plaintiff to begin with. They purchased it from the previous proprietors and they were fully conscious of the area of 289m² of land held under a final title which was what they purchased.
- E [76] Since the land was 289m² the defendants cannot complain and if part of the house in the store and the shed does not stand on the final title but on the separate title then the defendants would have to demolish the structure that had encroached onto the plaintiff's land and to look to the previous proprietors for their loss.
- F [77] Where contractually the second SPA contains the remedy of the defendants in that what was bargained for in the house had to have part of the structure demolish, then it is for the defendants to bring an action in contract or in tort against the previous proprietors who seem to be aware of the problem of the house straddling two titles and their disposing of the house based on the final title alone.
- G [78] There had been no voluntary assumption of responsibility or reliance by the defendants when they purchased the house on an "as is where is" basis from the previous purchasers agreed in the recital (vi) of the second SPA at p. 54 of RCB. The test of proximity cannot be satisfied. Section 4A of the First Schedule to the second SPA had a description of the final title with an area of 289m² together with a three-storey terrace house erected thereon bearing the postal address of the said house at Villa Lumina Kiara.
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- I [79] We cannot see how a duty of care in tort can arise in this case for the defendants to bring an action in negligence against the plaintiff as the developer when all their rights are already encapsulated in the second SPA between them and the previous proprietors.

[80] Learned counsel for the defendants referred the court to the case of *Allan Bryan v. Judith Anne Maloney* [1995] 2 CLJ 503, a decision of the High Court of Australia where it was held as follows:

[2] In considering the proximity between the appellant and the respondent, it must be determined whether the relationship which exists between a professional builder of a house, such as the appellant, and a subsequent owner, such as the respondent, possesses the requisite degree of proximity to give rise to a duty to take reasonable care on the part of the builder to avoid the kind of economic loss sustained by the respondent in the present case. The only connection will be the house itself, which is a permanent structure to be used indefinitely and a significant investment for a subsequent owner. *It is obviously foreseeable by such a builder that the negligent construction of the house with inadequate footings is likely to cause economic loss to the owner of the house at the time when the inadequacy of the footings first becomes manifest.*

[3] *The policy consideration underlying the reluctance of the Court to recognise a relationship of proximity and a consequential duty of care in cases of mere economic loss are largely inapplicable to the relationship between a builder and a subsequent owner as regards this particular kind of economic loss ie, the diminution in value of a house when the inadequacy of its footings first becomes manifest by reason of consequent damage to the fabric of the house.*

[4] In all the circumstances, the relationship between the builder and subsequent owner as regards the particular kind of economic loss should be accepted as possessing a comparable degree of proximity to that possessed by the relationship between builder and first owner and as giving rise to a duty to take reasonable care on the part of the builder to avoid such loss. (emphasis added)

[81] The High Court of Australia was dealing with a defect in the house in the inadequacy of its footing which manifested itself only later when the subsequent owner bought the house. There was sufficient reliance on the skill of a professional builder to ensure that the foundation of the house is secure. It was a claim coming sufficiently within the scope of the duty of care of the builder or the developer. There existed a sufficient degree of proximity in the house which was not properly built. The subsequent owner did not appear to have any possible contractual claim for the defective footing against the previous owner.

[82] As explained by our Federal Court in *Lok Kok Beng (supra)*, each case would have to be decided on its own particular merits and peculiar matrix and a relevant factor would be what the contracting parties had provided for contractually as follows:

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- A [56] It is to be noted that the Judgment in the *Highlands Tower* case was answered giving emphasis to considerations of public policy, in the context of s3 Civil Law Act. Nevertheless, it was clearly stated that *damages in the nature of pure economic loss is recoverable in Malaysia 'under limited situations'*. However, the court was silent as regards the circumstances giving rise to such duty of care.
- B ...
- C [82] In other words, the imposition of policy considerations required some measure of public policy to be infused in the establishment of a duty of care. In the present appeal, we agree with the Court of Appeal that *the court must give consideration to the presence of a contractual matrix between the developer and purchasers which clearly define the rights and liabilities of parties and their relative bargaining positions. There can be no action against the architect if the remedy asked for is specifically provided for in the contract.* Otherwise, it has the effect of rewriting the contractual terms. Such claims must be dismissed on grounds of policy. Nevertheless, we must reiterate that a claim for negligence must be brought within the scope of duty of care. The recoverability of claims for pure economic loss in negligence cases is dependent on the facts of individual cases. Some measure of public policy must be considered though it should not be the sole determinant of liability. (emphasis added)
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- E [83] Very importantly in the present case, the defendants had purchased the land of 289m² and not 340m² and the previous proprietors were fully conscious of the dilemma created in the trespass when they sued and obtained a refund of part of their purchase price based on a shortfall of 51m² of land.
- F [84] The Federal Court in *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683; [2018] 5 MLJ 561 did recognise that in “exceptional cases” pure economic loss might be allowed in a negligence claim but the present case does not fall under the rubric of “exceptional cases.” The Federal Court opined as follows:
- G [80] In exceptional cases, recovery for pure economic loss could be allowed. ‘In New Zealand certain first instance decisions allow relational claims on a ‘proximity’ analysis similar to that in Australia. The Court of Appeal has not finally determined the question, but at least two decisions give some support to a transferred loss theory’ (*Clerk & Lindsell* (13th Ed) at 2-232). ‘In *Caltex Oil (Australia) Pty Ltd v. Dredge ‘Willemstad’* [1976] HCA 65; (1976) 136 CLR 529, the High Court of Australia allowed recovery where the oil supply to the claimant’s refinery was cut because the defendant damages the supply pipeline which was not owned by the claimant ... what seems to have influenced the High Court most was the fact that the damage to the claimant’s refinery was specifically foreseeable. In *Canadian National Railway Co v. Norsk Pacific Steamship Co* (1992) 91 DLR (4th) 289 the Supreme Court of Canada developed an exception based on the notion of ‘joint-venture’ and justified a finding of proximity ... In *Perre*
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v. Apand Pty Ltd [1999] HCA 36; (1999) 164 ALR 606 the Australia High Court cautiously expanded the scope of exceptional recovery. The defendant negligently supplied diseased potato seed to a grower who produced a diseased crop. This resulted in a quarantine being imposed on all growers within a 20km radius of the outbreak. The claimants fell within the quarantine and suffered losses both as growers and processors ... In *Perre*, there was little risk of indeterminacy; the autonomy of the defendant was already limited by its liability for the physical damage; the claimant was vulnerable as there was nothing it could do by way of contract to protect itself; and the defendant knew of the risks of supplying diseased seed. Hence a duty should be imposed. The current willingness of the English appellate courts to articulate policy reasoning rather than to rely on bright lines excluding liability, suggests that the incremental approach of *Perre* might be followed' (*Clerk & Lindsell on Torts* at 8-141).

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[85] Even if assuming for a moment there is a duty of care, we are of the view that the plaintiff had not breached this duty with respect to the defendants.

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[86] The plaintiff built within the qualified title and the building plans had been approved by the authorities. The plaintiff had no control over the land office over the final title or titles to be issued. In this case, the land office issued one title in the final title for a land area of 289m² fully conscious that the qualified title was for a land area of 340m². The plaintiff had built the house within the boundary of the qualified title in accordance with the pre-computation plan, layout plan and building plans approved by the land office and the Datuk Bandar Kuala Lumpur ("DBKL").

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[87] The learned High Court Judge had made a specific finding of negligence by reference to the evidence of PW2 who testified that he knew of the reduction of area when the final title was issued on 7 October 2009 and that at that time the house was in the midst of construction up to the 2nd or 3rd floor and that the construction of the house was only completed some 13 months after the final title was issued.

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[88] The learned High Court Judge noted that having known of the shortcomings of the construction of the house, the plaintiff did nothing to rectify the situation and that steps to rectify the situation were only taken after the previous suit had been commenced.

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[89] Learned judge held that he was thus constrained to state that he did find a case of negligence as mounted by the defendants and further concluded that it was foreseeable that damage would occur as a result of the construction of house over Lot 80315 (the separate title).

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[90] With respect, we do not think that the plaintiff would be negligent for continuing to build according to the pre-computational plan, layout and building plans because it cannot but build according to the plans as approved as required under cl. 13(4) of the first SPA.

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- A [91] The plaintiff was proved right both in having the CF issued and finally in having the separate title issued on 12 November 2013.
- B [92] Any amendments and alterations to the plans would require approval of DBKL under cl. 13(4) of the first SPA and that would take time and further delay the construction. The plaintiff's stand that it was all along a typographical mistake where the area was concerned was finally vindicated.
- C [93] The land office could of course choose to ask for a surrender of the final title and a re-issuance of a corrected final title encompassing the 51m² shortfall in area. The plaintiff has no control over which method the land office would prefer to take to correct their admitted mistake.
- [94] The land office must have felt that the quicker and more feasible method would be to issue a separate final title in the separate title in Lot 80315. Moreover, the said final title had already been charged to a bank by the previous proprietors on 9 October 2010.
- D [95] The plaintiff thus cannot be faulted and certainly cannot be found to have been negligent because it was building within the correct boundary of the qualified title of 340m² and had the final title being correctly issued, it would just have been one final title in the final title of 340m² and not 289m².
- E [96] The more we delve into the genesis of the problem and how it is being played out, the more we are convinced that the plaintiff cannot be faulted and certainly cannot be held to have been negligent.
- F [97] The learned trial judge had also held that once foreseeability of damages occurring is established, the existence of a duty of care is inevitable as against the plaintiff. That is not quite correct as was held by Dillon LJ in *Simaan General Contracting Co v. Pilkington Glass Ltd (No 2)* [1988] 1 All ER 791; [1988] QB 758; [1988] 2 WLR 761 where the court refused to allow direct claim between non-contracting parties in a chain of contract relationships where the risks have been regulated by the parties' respective contracts with their contracting party.
- G [98] In allowing the appeal, Bingham LJ, in his judgment at p. 803 stated that:
- H Just as equity remedied the inadequacies of the common law, so has the law of torts filled gaps left by other causes of action where the interests of justice so required. I see no such gap here because *there is no reason why claims beginning with the sheikh should not be pursued down the contractual chain, subject to any short cut which may be agreed on, ending up with a contractual claim against Pilkington.* That is the usual procedure. It must be what the parties contemplated when they made their contracts. I see no reason for departing from it. (emphasis added)
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[99] Dillon LJ held, in respect to duty of care at p. 804 as follows:

.... foreseeability of harm or loss does not of itself and automatically lead to a duty of care. Foreseeability of harm is a necessary ingredient of a relationship in which a duty of care will arise, but not the only ingredient. Foreseeability of harm does not become enough to make a harm recoverable by the plaintiff just because what was foreseeable was harm to the plaintiff as an individual rather than a member of a general and unascertained class ...

(emphasis added)

[100] It cannot be said that the plaintiff must anticipate and foresee that the land office would be making a mistake here. In fact, the converse is true in that the plaintiff or anyone for that matter does not expect a land office to make such a mistake especially when a final title is issued after a proper re-surveying is done. There was no valid reason for the plaintiff to anticipate and foresee that the land area would be reduced by 51m² in the final title to be issued.

[101] The CF was also issued without any problem. If indeed the house had been built exceeding the boundary for the 340m² land held under the qualified title, no CF would have been issued.

[102] The land office admitted its mistake though a bit late in the day. It was unfortunate that the meeting could only be held after the High Court in the previous suit had on 31 May 2011 given judgment against the plaintiff here. The mistake had arisen from the two different surveyors of the land office using different datum points of reference and bearings when doing the survey for the issuance of the final title.

[103] That we must say has nothing to do with the negligence of plaintiff as the mistake was not traceable and hence did not originate from the plaintiff by the land office very own admission as minuted in the minutes produced at the trial. See pp. 38-42 of RCB.

[104] The land office then in its letters dated 12 September 2011 and 2 November 2011 informed the plaintiff that a land measuring 51m² was approved to be alienated to the plaintiff. The land office then rectify the mistake by issuing another title in the separate title in Lot 80315 to the plaintiff.

[105] The plaintiff duly paid RM84,881 to the land office as the premium required.

[106] However the separate title in Lot 80315 was only issued to the plaintiff some two years later on 12 November 2013.

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- A [107] The plaintiff subsequently wrote to the previous proprietors to inform them about the separate title issued and the return of the sum of RM473,444.43 paid under protest. In fact, the judgment sum plus interest was paid on condition that as and when a separate title is issued to cover the difference in the area of 51m² the amount paid will be refunded and the
- B separate title would be transferred to the previous proprietors.
- [108] There was no response. By that time, the previous proprietors had already sold the house to the defendants by the second SPA dated 29 June 2015. They had transferred the house to the defendants upon full payment of the purchase price and with that they “transferred” the problem to the
- C defendants. It was no longer their baby!
- [109] The plaintiff took the pro-active step in contacting the defendants in a meeting on 19 November 2014 to try to resolve the issue that had arisen. There was no response from the defendants after the meeting.
- D [110] The learned High Court Judge had also held that the plaintiff only paid RM84,881 and was now trying to extort monies it lost in the previous suit from the defendants. Again with respect, the sum of RM84,881 was the premium paid for the separate title to be issued and what was paid by the plaintiff to the previous proprietors under the judgment in the previous suit
- E was the sum of RM473,444.43 being shortfall in 51m² of land and interest of RM193,839.82. We see no element of extortion but of recouping what it had lost which it would not have had the previous proprietors not commenced the previous suit and had they informed the defendants of the problem that had arisen with the house standing on two titles or that part of the house was on State land as the case may be.
- F [111] Learned counsel for the defendants submitted that the defendants are unsuspecting purchasers who are now being held at ransom after having paid a sum of RM 4.1 million to purchase the property built by the plaintiff. That with the greatest of respect is beside the point. If the defendants have a genuine complaint against the previous proprietors for making them
- G unsuspecting, then they should bring in the previous proprietors as third parties or even after this appeal, to commence a fresh action against them. After all the defendants did not buy the 289m² land from the plaintiff but from the previous proprietors. What is more, the previous proprietors did not want to buy the additional 51m² land after having appreciated the
- H problem that the house stands on this additional land as well; they had rather retained the land represented in the final title of 289m².
- [112] It is our considered finding that the plaintiff does not owe the defendants a duty of care and in any event that duty has not been breached.

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Whether The Principle Of *Res Judicata* Would Apply To Bar The Defendants From Making This Counterclaim

[113] The doctrine of *res judicata* is a flexible doctrine to be applied to a factual matrix to prevent injustice and to bring finality to matters which the court has already decided, either between the same parties or even to a non-party if the underlying factual substratum is the same. No further litigation is allowed on the ground that the issue is already *res* in that the court has already decided on it.

[114] We agree with learned counsel for the plaintiff that the matters complained of in the counterclaim emanated from the same transaction and facts, in that the plaintiff had built the house and sold it to the previous proprietors and there was a shortfall in the land area in a final title by 51m². That matter had already been decided by the High Court with the plaintiff having to refund the previous proprietors the purchase price based on the shortfall in the area of 51m².

[115] The previous proprietors had already received the refund in the purchase price and with that their acceptance that the final title is only 289m².

[116] The plaintiff's stand was all along that it must have been a mistake and that the land office would be rectifying the mistake. When the mistake was rectified with the issuance of the separate title, the previous proprietors were no longer keen to purchase the separate title and get back the land as originally contracted for which was 340m². They had by then sold off the house to the defendants. They thought they had been rid of the problem but then the defendants have now become laden with it.

[117] No doubt the defendants did not know about this problem until after they had signed the second SPA though before its completion. The plaintiff informed the defendants about it but they were not keen to resolve it. They could easily have brought the previous proprietors into the picture so to speak by making them third parties.

[118] The plaintiff here ought not to have to be sued twice for the same problem; once by the previous proprietors and now by the present proprietors. It would result in a grave injustice to the plaintiff who had already parted with the refund of the purchase price based on a shortfall of 51m². The plaintiff would be punished and vexed twice.

[119] It cannot be that where the previous proprietors had received back cash for the shortfall of 51m² the present proprietors in the defendants can get back the same benefit of 51m² by not having to pay for it. After all, the second SPA declared that what they purchased was only 289m².

A [120] Whether it is a case of misrepresentation or breach of implied term of the second SPA is a matter for the defendants to sort out with the previous proprietors.

B [121] Where the defendants here appear to have a recourse against the previous proprietors, the court would be inclined to apply the principle of *res judicata* not only to achieve consistency of result arising from the previous suit but also to prevent an injustice to be visited upon the plaintiff which had already parted with a refund of the purchase price based on the shortfall of 51m².

C [122] This is where the principle of *res judicata* in its amplified and wider sense would be applied even to a non-party to prevent a re-litigating of the same issue. The *dicta* of the Court of Appeal in *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122 is particularly in point:

D [25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of *res judicata* as the preferred and correct legal position, *the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from relitigating a specific issue that had been decided in the prior separate action. The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions.* What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Pahang Darul Makmur*). (emphasis added)

G [123] We are ever conscious that to warrant an appellate intervention, the plaintiff must demonstrate to this court that the learned trial judge had been plainly wrong based on the findings of facts and the inferences made and conclusions drawn. Here is a case where the audio-visual advantage of having heard the witnesses had been more than negated by the largely uncontroverted documents of legal ownership and registration of title of the plaintiff and the previous proprietors *vis-a-vis* the defendants' title derived as it is from what the previous proprietors had bargained and sued for.

H [124] At the end of the day, the dispute between the parties could and should be resolved based on the issues of law that are being presented resting mainly on material facts that are not seriously disputed. With the greatest of respect to the trial judge, there had not been sufficient judicial appreciation of the

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evidence of the witnesses supported as it is from documentary evidence not seriously in dispute. See *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97.

[125] We are thus in a very real sense not being disadvantaged at all or handicapped in any way for want of opportunity to hear the witnesses. In answering the legal issues raised, we have, with respect, disagreed with the learned trial's judge finding of no trespass by the defendants. We have instead found trespass against the defendants and that the plaintiff has not been negligent in any way.

Pronouncement

[126] For all the above reasons, we were unanimous in finding there is merit in Appeal No 1761. We had thus allowed prayers 3 to 8 of the statement of claim as set out above and as for prayer 4, the period shall be three months from the date of this order for the removing of the encroaching structures.

[127] With respect to prayer 6 – the order that alternatively the defendants shall have the option to purchase the land held under the separate title; this shall be exercised before the expiry of the three months period from the date of this order by the defendants who are the respondents in Appeal 1761 by notice in writing to the plaintiff/appellant.

[128] In the event that the parties cannot agree on the purchase price, then the determination of the valuer to be appointed by the President of the Board of Valuers, Appraisers and Estate Agents shall be binding on the parties and the parties shall bear equally the costs of the valuation.

[129] Interest at 5% per annum shall be charged on the purchase price as determined by the valuer from the date of this order till realisation.

[130] All costs and expenses incurred in the transfer and registration of the separate title shall be borne by the defendants/respondents.

[131] Correspondingly and consequently, there is no merit in Appeal No 1778 and so we had dismissed the appeal. The judgment of the High Court was also set aside.

[132] We also ordered costs of RM30,000 here and below subject to allocator.

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